Supreme Court, U.S.
FILED
SEP 2 1993
OFFICE OF THE CLERK

No. 93-272

In The

# Supreme Court of the United States

October Term, 1993

PATRICIA K. SULCER,

*Petitioner,*

v.

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA, ROBERT F. DAVIS, HILTON MELOT, JAMES YOUNG and JOHN A. BARRETT, JR.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL MINNIS,* OBA #6251
DAVID MCCULLOUGH, OBA #10898
MICHAEL MINNIS & ASSOCIATES, P.C.
3160 Liberty Tower,
100 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7686

*Attorneys For:*
*Citizen Band Potawatomi Indian Tribe of Oklahoma, et al., Respondents*

*Counsel of Record

September 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

## QUESTION PRESENTED FOR REVIEW AND STATEMENT

Consistent with Sup. Ct. R. 15.2 and 24.1(a), respondents state that the following question is presented for review: do federal courts have jurisdiction under the Indian Civil Rights Act over a claim for wrongful discharge by a former non-Indian employee of an Indian tribe?

## PARTIES

Consistent with Sup. Ct. R. 24.1(b), respondents advise the Court that the caption of the case contains the names of all parties. However, the proper name of the tribe is the Citizen Band Potawatomi Indian Tribe of Oklahoma. James Young was named as a party defendant by the petitioner in the district court. Young was Vice Chairman of the Business Committee of the Citizen Band Potawatomi Indian Tribe of Oklahoma at the time of the actions of which petitioner complains. However, at the time of suit, Young was no longer a Potawatomi Business Committee member and no appearance was made by him in the district court below. Nevertheless, the district court dismissal order covered all defendants.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW AND STATEMENT ..... i

PARTIES ..... ii

TABLE OF AUTHORITIES ..... iv

JURISDICTIONAL STATEMENT ..... 1

STATEMENT OF THE CASE ..... 2

SUMMARY OF ARGUMENT ..... 4

ARGUMENT ..... 5

I. BECAUSE INDIAN TRIBES ARE IMMUNE FROM LAWSUITS IN FEDERAL COURT UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY, SULCER'S COMPLAINT WAS PROPERLY DISMISSED ..... 5

A. Absent congressional waiver, Indian tribes are immune from unconsented suits ..... 5

B. Tribal officials acting in their official capacity possess the sovereign suit immunity enjoyed by Indian tribes ..... 8

II. THE ICRA DID NOT GRANT FEDERAL JURISDICTION OVER A WRONGFUL DISCHARGE ACTION AGAINST A TRIBE NOR WAIVE, EITHER EXPLICITLY OR IMPLICITLY, THE SOVEREIGN SUIT IMMUNITY OF INDIAN TRIBES .. 11

A. The ICRA does not provide for federal court jurisdiction over claims of improper discharge by former tribal employees ..... 12

B. Federal courts do not have jurisdiction over wrongful discharge claims made by former tribal employees ..... 14

CONCLUSION ..... 15

# TABLE OF AUTHORITIES

Page

CASES:

*Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986) ..... 5

*Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977) ..... 8

*Enterprise Management Consultants, Inc. v. United States, ex rel. Hodel*, 883 F.2d 890 (10th Cir. 1989) ..... 7

*Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) ..... 5

*Kenai Oil & Gas, Inc. v. Dept. of Interior*, 522 F.Supp. 521 (D. Utah 1981) ..... 8

*Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949) ..... 8, 10

*Lehman v. Nakshian*, 453 U.S. 156 (1981) ..... 8

*National Farmer's Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) ..... 9

*Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 457 (10th Cir. 1989) ..... 8

*Okla. Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905 (1991) ..... 6, 10

*Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978) ..... 5

*Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) ..... 9

*People of the State of California v. Quenchan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979) ..... 7

TABLE OF AUTHORITIES – Continued

Page

*Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, 53 L.Ed.2d 677, 97 S.Ct. 2616 (1977) ..... 6

*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) ..... 5, 11, 12, 14

*Sulcer v. Barrett*, 17 Ind. L. Rptr. 6138 (C.B.Pot. S. Ct. 1990) ..... 3, 10

*Sulcer v. Citizen Band Potawatomi Indian Tribe*, No. CIV-91-1170-C (W.D. Okla. Jan. 27, 1992) ..... 10

*Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572 (10th Cir. 1984) ..... 8

*Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986) ..... 6

*Turner v. United States*, 248 U.S. 354, 63 L.Ed. 291, 39 S.Ct. 109 (1919) ..... 6

*U.S. v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 84 L.Ed. 894, 60 S.Ct. 653 (1940) ..... 6, 7

*Wardle v. Ute Indian Tribe*, 623 F.2d 670 (10th Cir. 1980) ..... 14, 15

*Weeks v. United States*, 406 F.Supp. 1309 (W.D. Okla. 1975) ..... 8

STATUTES:

25 U.S.C.A. § 1303 (West 1983) ..... 12

25 U.S.C.A. §§ 1301 et seq. (Indian Civil Rights Act) ..... i, 11

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C.A. § 1254(1) ..... 1

28 U.S.C.A. § 1331 ..... 9, 14

28 U.S.C.A. § 1343 ..... 9, 14

42 U.S.C.A. § 2000e(b)(1) (West 1981) ..... 15

42 U.S.C.A. § 2000e-2(i) (West 1981) ..... 15

42 U.S.C. § 1983 ..... 4

42 U.S.C. § 1985 ..... 4

Sup. Ct. R. 15.2 and 24.1(a) ..... i

Sup. Ct. R. 24.1(b) ..... ii

Sup. Ct. R. 24.1(e) ..... 1

OTHER:

C.B. Pot. Const. art 7, § 2 ..... 9, 10

*Handbook of Federal Indian Law* 324 (1982 ed.), Felix S. Cohen ..... 6, 12, 13

## JURISDICTIONAL STATEMENT

Consistent with Sup. Ct. R. 24.1(e), respondents advise the Court that petitioner relies on 28 U.S.C.A. § 1254(1) as the jurisdictional basis for this action. Pet. at 2. Petitioner has not adequately alleged a proper ground for invoking the jurisdiction of this Court. This action arises from the Tenth Circuit Court of Appeals.[1] Thus, the opinion may be reviewed by writ of *certiorari* granted upon the petition of any party to any civil case after rendition of judgment. 28 U.S.C.A. § 1254(1). However, the petition for writ of *certiorari* "shall be deemed in time when it is filed with the clerk of this court within 90 days after the entry of judgment." Sup. Ct. R. 13.1. For good cause shown, a justice "may extend the time to file a petition for writ of *certiorari* for a period not exceeding 60 days." The Tenth Circuit order and judgment in this action was filed February 18, 1993. The 90-day period expired May 18. On or about May 21, petitioner requested an extension of time that was granted in part by Justice White who extended the time to and including June 18. On or about June 21, petitioner requested a second extension of time that was granted extending the time to July 8.

---

[1] The caption on the cover of the petition for writ of *certiorari* inaccurately states that it is a "Petition for a Writ of *Certiorari* to the Supreme Court of the State of Oklahoma."

## STATEMENT OF THE CASE

Petitioner Patricia K. Sulcer ("Sulcer") is upset because she was fired as an employee of the Citizen Band Potawatomi Indian Tribe of Oklahoma, a federally-recognized Indian tribe with a governing body organized pursuant to federal statutes. The tribe's trust lands are physically located within Pottawatomie County, Oklahoma. The respondents are the tribe itself and four individuals who were members of the Potawatomi Business Committee when Sulcer was fired. Because the individual respondents were sued in their official capacities, all respondents will hereafter be referred to collectively as "Potawatomi."

Sulcer, a non-Indian, was hired by the Potawatomi on or about July 21, 1983. Nearly two years later, on or about March 12, 1985, she resigned or was fired as the Potawatomi public information director. On July 1, 1985, Sulcer was rehired as the Potawatomi Assistant Tribal Administrator. She was not hired under any written contract and was assigned to do various tasks, including to serve as editor of the tribal newspaper, the *How-Ni-Kan*.

On July 26, 1989, the Business Committee met in executive session and voted, three-to-one,[2] to direct the Tribal Administrator, Dr. Francis Levier, who was also a Councilman, to terminate Sulcer's employment. On July 27, Dr. Levier, in his capacity as Tribal Administrator and

---

[2] Respondent Bob Davis, (Secretary/Treasurer), Respondent James Young (Vice Chairman) and Respondent Hilton Melot (Councilman) voted "aye." Dr. Francis Levier (Councilman) voted "nay." Respondent John Barrett, Jr. (Chairman) abstained.

acting consistent with directions received from the Potawatomi Business Committee, terminated Sulcer's employment, gave her two weeks' severance pay, 22 hours annual leave pay, and 32 hours of regular pay. Thereafter, Sulcer promptly filed for and received unemployment compensation.

On August 11, Sulcer sued four Business Committee members (Barrett, Young, Davis and Melot) in Potawatomi District Court, claiming that her dismissal was unjust, and praying, *inter alia*, for a temporary restraining order. Subsequently, the four defendants moved to dismiss Sulcer's suit for want of jurisdiction. The Potawatomi District Court ruled that the defendants were immune from suit and granted the motion to dismiss. Sulcer appealed. On September 5, 1990, the Potawatomi Supreme Court issued a decision affirming the dismissal of the district court. *See Sulcer v. Barrett*, 17 Ind. L. Rptr. 6138 (C.B.Pot. S. Ct. 1990).

On July 26, 1991, Sulcer filed this action for damages[3] in federal district court against the same four individuals plus the tribe. Because she did not clearly allege a factual basis to support the statutes referenced in the jurisdictional paragraph of her amended complaint, the Potawatomi moved to dismiss the First Amended Complaint for lack of subject matter jurisdiction and/or failure to state a claim. When this motion was granted on January 27, 1992, Sulcer appealed. On February 18, 1993,

---

[3] In her First Amended Complaint, Sulcer made nine specific prayers for relief. All but one seek damages in one form or another. The exception seeks, alternatively, reinstatement to her job.

the Tenth Circuit issued an order and judgment, affirming the dismissal by the district court.

## SUMMARY OF ARGUMENT

Federal courts are courts of limited jurisdiction defined by the United States Constitution and by federal statutes enacted consistent therewith. In order to maintain an action in federal court, a litigant must allege grounds to show the existence of jurisdiction under an appropriate federal statute. In the amended complaint, Sulcer simply listed several federal statutes,[4] but did not later provide factual allegations that invoked jurisdiction under the cited federal statutes. Although this deficiency made a response to the amended complaint difficult, none of Sulcer's allegations were sufficient under any of the statutes alleged in the complaint to support a cause of action. Thus, dismissal of Sulcer's complaint was properly affirmed by the Tenth Circuit.

In her petition to this Court, Sulcer has now narrowed her jurisdictional basis to the Indian Civil Rights Act ("ICRA"). The ICRA has not been recognized in any reported decision as the basis for federal jurisdiction over a wrongful discharge action against an Indian tribe. Moreover, this Court has expressly recognized that the

---

[4] In Sulcer's First Amended Complaint, the jurisdictional statement read: "Federal jurisdiction is proper in this action pursuant to 28 U.S.C. Sections 1331, 1343, 42 U.S.C. Sections 1983 and 1985; and 25 U.S.C. Section 1301 et seq. (Indian Civil Rights Act)."

only action in federal court against an Indian tribe authorized by the ICRA is a *habeas corpus* action. Consequently, the respondent tribe and the four individuals acting for and on behalf of the tribe are immune from suit.

## ARGUMENT

Federal courts are courts of limited jurisdiction. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 701 (1982). "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded. *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 374 (1978).

### I. BECAUSE INDIAN TRIBES ARE IMMUNE FROM LAWSUITS IN FEDERAL COURT UNDER THE DOCTRINE OF SOVEREIGN IMMUNITY, SULCER'S COMPLAINT WAS PROPERLY DISMISSED.

#### A. Absent congressional waiver, Indian tribes are immune from unconsented suits.

In *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978), this Court stated unequivocally:

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.

> *Turner v. United States*, 248 U.S. 354, 358, 63 L.Ed. 291, 39 S.Ct. 109 (1919); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513, 84 L.Ed. 894, 60 S.Ct. 653 (1940); *Puyallup Tribe v. Washington Dept. of Game*, 433 U.S. 165, 172-173, 53 L.Ed.2d 677, 97 S.Ct. 2616 (1977). This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But, "without Congressional authorization," the "Indian Nations are exempt from suit." *United States v. United States Fidelity & Guaranty Co., supra* at 512, 84 L.Ed. 894, 60 S.Ct. 653.

This Court also has noted: "[T]he common law sovereign immunity possessed by [Indian tribes] is a necessary corollary to Indian sovereignty and self-goverance." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986); *see generally* Felix S. Cohen, *Handbook of Federal Indian Law* 324 (1982 ed.) [hereinafter Cohen]. The doctrine of tribal sovereign suit immunity was recently reaffirmed by this Court in litigation involving the Potawatomi.

> Indian tribes are "domestic dependent nations," which exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.

*Oklahoma Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 909 (1991) (citation omitted). Concluding, the *Potawatomi* Court stated:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court,

> and has been reaffirmed in a number of cases. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has constantly reiterated its approval of the immunity doctrine. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'over-riding goal' of encouraging tribal self-sufficiency and economic development." Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

*Id.* at 910 (citations omitted).

The immunity possessed by Indian tribes is similar to that of the United States. Neither sovereign "can be sued without the consent of Congress." *People of the State of California v. Quenchan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) (California suit against tribe dismissed because Public Law 280 [18 U.S.C. § 1162] not waiver of immunity); *see also Enterprise Management Consultants, Inc. v. United States, ex rel. Hodel*, 883 F.2d 890, 892 (10th Cir. 1989) (affirming dismissal of suit against Potawatomi). "Indian Nations are exempt from suit without congressional authorization. It is thought the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940).

The defense of sovereign immunity goes to the subject matter jurisdiction of a court. A sovereign "is

immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981); *see also Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 457, 459 n.2 (10th Cir. 1989). Because Congress has not waived the sovereign immunity of Indian tribes and because the Potawatomi have not consented to this action, the district court properly dismissed Sulcer's complaint.

### B. Tribal officials acting in their official capacity possess the sovereign suit immunity enjoyed by Indian tribes.

Indian tribes are not only immune from direct legal action against them without congressional consent, but also are immune from indirect attempts to sue them by naming tribal officers as defendants. *See Weeks v. United States*, 406 F.Supp. 1309, 1325 (W.D. Okla. 1975), *rev'd. on other grounds, Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977); *see also Kenai Oil & Gas, Inc. v. Dept. of Interior*, 522 F.Supp. 521 (D. Utah 1981), *aff'd.*, 671 F.2d 383 (10th Cir. 1982). However, the actions of the tribal officer must be within the scope of his authority. *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 576 (10th Cir. 1984) (McKay, J., concurring) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949)). Here, the actions of the Business Committee members were well within the scope of their authority. Pursuant to the Potawatomi Constitution, "the Business Committee is empowered to enact legislation, transact business, and otherwise speak or act on behalf of the Citizen Band

Potawatomi Indian Tribe of Oklahoma." *C.B. Pot. Const.* art 7, § 2, Pet'r. App. at A-75.

When a suit is brought against a government official, a threshold question is whether the suit is against the official or against the sovereign itself.

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury' or domain, or interfere with the public administration, or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.' "

*Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 n.11 (1984) (citations omitted). Here, the relief sought by Sulcer (damage for wrongful discharge and reinstatement) can only be granted by the tribe.

Sulcer argues that *National Farmer's Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) established criteria for "determination of the extent of tribal court jurisdiction versus complete immunity." Pet. at 19. The case cited, however, does not support Sulcer's proposition. *National Farmers* held that a federal district court had jurisdiction under 28 U.S.C.A. § 1331 to determine whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court. *Id.* at 852. In other words, a district court could determine under § 1331 whether a tribal court exceeded the limits of its jurisdiction. *Id.* at 853. This holding is inapplicable to Sulcer's claim for several

reasons. First, as the Tenth Circuit observed,[5] the Potawatomi district court did not exceed its subject matter jurisdiction; rather, the district court refused to exercise jurisdiction. Second, unlike Sulcer, the non-Indian plaintiffs in *National Farmer's* sought an injunction to restrain the execution of a default judgment in tribal court. Here, Sulcer seeks damages against the Potawatomi. Finally, contrary to Sulcer's contention, the *National Farmer's* court did not address the issue of sovereign suit immunity.

Citing *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949), Sulcer also asserts that "the tribe's immunity is unavailable to the committee members acting beyond their authority." Pet. at 20. This legal conclusion was specifically rejected by both the district court[6] and the tribal court because of the broad constitutional grant of authority to the Business Committee: "the Business Committee is empowered to enact legislation, transact business and otherwise speak or act on behalf of the" tribe "in all matters on which the tribe is empowered to act now or in the future." *C.B. Pot. Const.* art 7, § 2.[7]

Quoting *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct.

---

[5] *See* slip op. at 5, Pet'r. App. at A-8.

[6] *See Sulcer v. Citizen Band Potawatomi Indian Tribe*, No. CIV-91-1170-C (W.D. Okla. Jan. 27, 1992) (holding that Sulcer failed to state a claim with regard to alleging that the defendants acted outside the scope of their authority when they terminated her) Pet'r App. at A-19.

[7] *See Sulcer v. Barrett*, 17 Ind.L.Rptr. 6138, 6141 (C.B.Pot. S. Ct. 1990) Pet'r. App. at A-27.

905, 912 (1991), Sulcer also suggests that the Potawatomi should be liable in suits for damages in federal courts. The Potawatomi language does not support Sulcer's claims. The referenced decision involved a challenge by an Indian tribe to a state tax assessment. Specifically, the Court held that the state could not sue the tribe through a counterclaim. Moreover, the *Potawatomi* decision did not indicate that tribal officials would be liable to terminable-at-will employees for damages in federal courts.

## II. THE ICRA DID NOT GRANT FEDERAL JURISDICTION OVER A WRONGFUL DISCHARGE ACTION AGAINST A TRIBE NOR WAIVE, EITHER EXPLICITLY OR IMPLICITLY, THE SOVEREIGN SUIT IMMUNITY OF INDIAN TRIBES.

Sulcer's principal contention in her petition is that Congress abrogated the doctrine of tribal suit immunity by enacting the ICRA. However, virtually the identical argument was specifically rejected by this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Sulcer accurately notes that a central purpose of the ICRA was to " 'secur[e] for the American Indian the broad Constitutional rights afforded to other Americans.' " *Id.* at 61 (quoting S. Rep. No. 841, 90th Cong. 1st Sess. 5-6 (1967)). However, the *Santa Clara* Court also determined that: "There is thus no doubt that respondents, American Indians living on the Santa Clara Reservation, are among the class for whose especial benefit this legislation was enacted." *Id.* Sulcer is not a tribal member, nor an American Indian, and does not reside in Indian country. Thus, she is not among the class of persons Congress intended to protect by enacting the ICRA. Additionally, the claims

presented by Sulcer in her complaint are far less compelling[8] than those in *Santa Clara* that were insufficient to abrogate the doctrine of sovereign immunity.

### A. The ICRA does not provide for federal court jurisdiction over claims of improper discharge by former tribal employees.

The ICRA expressly provides only for federal court jurisdiction over *habeas corpus* claims. 25 U.S.C.A. § 1303 (West 1983). As this Court recognized in *Santa Clara,* the ICRA does not provide for federal court jurisdiction over other types of claims potentially arising under the Act. *Santa Clara* at 58-59; *see also* Cohen at 668. Had jurisdiction over other types of claims been intended, Congress could have expressly provided for them. Even so, at various places in her petition, Sulcer maintains that federal courts should be available for any and all claims under the ICRA. However, Sulcer's contention is contrary to the ICRA's legislative intent, sound judicial policy, and extant case law. *See Santa Clara* at 61.

---

[8] In her petition, Sulcer, *inter alia,* alludes to the Potawatomi failure to follow tribal personnel policy manual. Pet. at 22, n.7. Her description is not accurate. The tribal personnel policy manual was not intended to diminish or otherwise adversely affect the power of the Business Committee. The manual governed actions by the tribal administrator and those under the administrator. In any event, Sulcer's claim would be inappropriate. Under the manual, a person objecting to a firing initiates a proceeding by filing "a written appeal with the tribal administrator." Sulcer never initiated any administrative appeal and can hardly now claim to have been denied any rights because the appeal process she did not initiate was not conducted.

Although the ICRA grants federal court jurisdiction over *habeas corpus* claims there is no indication that Congress intended to permit any action for monetary relief. Nevertheless, and without citing any authority, Sulcer suggests that her claims fall under the ICRA. Because of the presumption against implicit waivers of sovereign suit immunity and because there is absolutely no evidence that Congress intended to provide for jurisdiction of monetary claims against Indian tribes and their officers, Sulcer's assertion should be rejected. *See generally Cohen* at 669 ("The interpretation and application of the [ICRA] are largely matters for tribal institutions alone.").

Additionally, the Potawatomi have not waived their sovereign suit immunity, thereby consenting to suits in tribal and federal courts. More specifically, the Potawatomi have not consented to actions for employment-related claims. As a general rule, a waiver of sovereign immunity cannot be implied, but must be unequivocally expressed. Furthermore, where Congress has not explicitly provided for a cause of action, courts should be hesitant to find an implicit one. This Court has stated:

> Not only are we unpersuaded that a judicially-sanctioned intrusion into tribal sovereignty is required to fulfill the purposes of the ICRA, but to the contrary, the structure of the statutory scheme and the legislative history of Title I suggests that Congress' failure to provide remedies other than *habeas corpus* was a deliberate one.

*Santa Clara* at 61-62.

### B. Federal courts do not have jurisdiction over wrongful discharge claims made by former tribal employees.

Even if the ICRA waived tribal suit immunity, Sulcer has not identified a statute granting federal jurisdiction over her claim. The decision of the Tenth Circuit affirming the dismissal of Sulcer's complaint was based on two grounds. In addition to recognizing the general doctrine of tribal sovereign immunity, the Tenth Circuit observed that Sulcer did not identify a statute that conferred jurisdiction of her claims upon federal courts.[9] This holding is not challenged by Sulcer in her petition for *certiorari*. Consequently, assuming *arguendo* that Congress abrogated the doctrine of sovereign immunity, the ICRA does not provide a jurisdictional basis for Sulcer's complaint.

Following this Court's decision in *Santa Clara*, the Tenth Circuit decided *Wardle v. Ute Indian Tribe*, 623 F.2d 670 (10th Cir. 1980). In nearly all respects, *Wardle* is similar to the present case. When Wardle was fired after being employed for 17 years, he sued his employer, an Indian tribe, in federal court, alleging violations under the ICRA and various other general civil rights provisions. Affirming dismissal of his action, the Tenth Circuit noted that, although the plaintiff attempted "to invoke several statutory and constitutional bases for his cause of action, his suit stems only from the improper discharge of

---

[9] Slip op. 3-6, Pet'r. App. at A-4 – A-10 (holding district court did not have jurisdiction under 28 U.S.C.A. § 1331 or § 1343 and holding that even if tribal officials are not protected by sovereign immunity, there is no cause of action against them under the ICRA in federal court).

employment." *Id.* at 672. Such allegations brought the case "squarely within the provision of Title VII of the Civil Rights Act of 1964." *Id.* Title VII, however, does not apply to Indian tribes. 42 U.S.C.A. §§ 2000e(b)(1), 2000e-2(i) (West 1981); *see also Wardle* at 672. Thus, because Indian tribes are expressly exempt from the provisions of Title VII and because no other federal statute provides for federal court jurisdiction over claims of improper discharge against an Indian tribe, this Court should refrain from finding an implicit cause of action under the ICRA.

## CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

MICHAEL MINNIS,* OBA #6251
DAVID MCCULLOUGH, OBA #10898
MICHAEL MINNIS & ASSOCIATES, P.C.
3160 Liberty Tower,
100 North Broadway
Oklahoma City, Oklahoma 73102
(405) 235-7686

*Attorneys For:*
*Citizen Band Potawatomi*
*Indian Tribe of Oklahoma, et al.,*
*Respondents*

*Counsel of Record